TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 43.

SARAH CHUNN, PLAINTIFF IN ERROR,

vs.

THE CITY AND SUBURBAN RAILWAY OF WASHINGTON.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED MAY 28, 1906.

(20,272.)

(20,272.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 307.

SARAH CHUNN, PLAINTIFF IN ERROR,

vs.

THE CITY AND SUBURBAN RAILWAY OF WASHINGTON.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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1 In the Court of Appeals of the District of Columbia.

No. 1393.

SARAH CHUNN, Appellant,
vs.
THE CITY AND SUBURBAN RAILWAY OF WASHINGTON.

Supreme Court of the District of Columbia.

No. 44848. At Law.

SARAH CHUNN, Plaintiff,
vs.
THE CITY AND SUBURBAN RAILWAY OF WASHINGTON, Defendant.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

Declaration.

Filed August 3, 1901.

In the Supreme Court of the District of Columbia.

At Law. No. 44848.

SARAH CHUNN, Plaintiff,
vs.
THE CITY AND SUBURBAN RAILWAY OF WASHINGTON, Defendant.

The plaintiff, Sarah Chunn, sues the defendant, The City and Suburban Railway of Washington, a corporation organized under and by virtue of an act of Congress, approved on the 27th day of June, A. D., 1898;

For that heretofore, to wit, on the 29th day of September, A. D. 1900, and for a long time prior thereto, the defendant was a corporation doing business and having its habitat in the District of Columbia, and said defendant was the owner of a certain double track railroad, and operated and ran passenger cars propelled by electricity over its said road as a common carrier of passengers
2 for hire between the place or station called Berwyn, in the State of Maryland, and intermediate stations along its said line, and the city of Washington, in the District of Columbia and

that on the day and year aforesaid the plaintiff, for the purpose of becoming a passenger in one of defendant's cars from one of defendant's said intermediate stations, to wit, the station of Riverdale in the State of Maryland, to the said city of Washington in the District of Columbia, and being then and there ready to pay to said defendant or its agents the proper fare for such journey, did by the invitation of defendant, enter upon its premises and with all proper care and caution stand upon the platform of said defendant at the place designated and assigned by defendant as the proper place for persons about to take passage on its cars between said station of Riverdale and said city of Washington, and by reason hereof it became and was the defendant's duty to exercise a high degree of skill, care and caution to prevent all possible injury to plaintiff and to provide and equip its cars with adequate appliances for the safety of plaintiff, yet the defendant not regarding its duty in that behalf, by its servants and agents, so unskillfully, carelessly and negligently drove, managed, governed and operated one of its said cars, that said car for want of sufficient care, management and equipment thereof, did then and there strike plaintiff with great force and violence, and did hurl plaintiff for a great distance, to wit, the distance of twelve feet, and did cause plaintiff to fall upon the track of defendant with great force and violence; and thereby plaintiff's skull was fractured and her body badly lacerated and bruised, and her faculties permanently impa-red, and her mind, memory and understanding permanently weakened and impa-red, and plaintiff then and there became, and from thence hitherto has been, sick, sore, lame and disordered and prevented from attending to her lawful business and affairs, to the damage of the plaintiff in the sum of ten thousand dollars ($10,000).

2. The plaintiff also sues the defendant for that heretofore, to wit, on the 29th day of September, A. D. 1900, and for a long time prior thereto, the defendant was a corporation doing business and having its habitat in the District of Columbia, and said defendant was the owner of a certain double track railroad, and operated and ran passenger cars propelled by electricity over its said road as a common carrier of passengers for hire, between the place or station called Berwyn, in the State of Maryland, and intermediate stations along its said line, and the city of Washington, in the District of Columbia; and that on the day and year aforesaid the plaintiff, for the purpose of becoming a passenger in one of defendant's cars from one of defendant's said intermediate stations, to-wit, the station of Riverdale in the State of Maryland, to the said city of Washington, in the District of Columbia, and being then and there ready to pay to said defendant or its agents, the proper fare for such journey, did by the invitation of defendant, enter upon its premises; and by rea-

3 son hereof it became and was the defendant's duty to provide a proper and safely constructed, and properly and safely situated station platform for the reception of plaintiff, but the defendant not regarding its duty in that behalf, constructed its station platform in such a dangerous and unsafe manner, and located said platform in such a dangerous and unsafe position, that the plaintiff while in the exercise of all due care on her part, and while stand-

ing on said station platform, in the place designated and assigned by defendant as the proper place for persons about to take passage in its cars between the said station of Riverdale and the said city of Washington, was struck by one of defendant's said cars with great force and violence, and hurled for a great distance, to-wit, the distance of twelve feet, and was thrown upon the track of defendant with great force and violence; and thereby plaintiff's skull was fractured, and her body badly lacerated and bruised, and her faculties permanently impaired and her mind, memory and understanding permanently weakened and impa-red, and plaintiff then and there became, and from thence hitherto has been, sick, sore, lame and disordered and prevented from attending to her lawful business and affairs, to the damage of the plaintiff in the sum of ten thousand dollars ($10,000).

Wherefore the plaintiff brings this suit, and claims the said sum of ten thousand dollars ($10,000) besides the costs of suit.

VICTOR H. WALLACE,
PERCY METZGER,
Attorney- for Plaintiff.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

Plea in Abatement.

Filed August 29, 1901.

In the Supreme Court of the District of Columbia.

At Law. No. 44848.

SARAH CHUNN
vs.
THE CITY AND SUBURBAN RAILWAY OF WASHINGTON.

The defendant, The City and Suburban Railway of Washington, for answer to the declaration filed against it in the above-entitled cause, says that the said plaintiff ought not to have and maintain her said action against it, the said defendant, because it says that the said plaintiff, before and at the time of the commencement of this suit, was and still is an infant under the age of twenty-one years, and this the said defendant is ready to verify.

J. J. DARLINGTON,
R. B. BEHREND,
Attorneys for Defendant.

4 DISTRICT OF COLUMBIA, *ss:*

I, James B. Lackey, secretary and agent of the defendant in this cause, The City and Suburban Railway of Washington, make oath and say that the plea hereunto annexed is true in substance and fact.

JAS. B. LACKEY.

Sworn to and subscribed before me this 28" day of August, A. D. 1901.

[SEAL.] F. J. WHITEHEAD,
Notary Public.

Joinder in Issue.

Filed August 31, 1901.

In the Supreme Court of the District of Columbia.

At Law. No. 44848.

SARAH CHUNN
vs.
THE CITY AND SUBURBAN RAILWAY OF WASHINGTON.

The plaintiff joins issue upon the defendant's plea in abatement.

VICTOR H. WALLACE,
PERCY METZGER,
Attorneys for Plaintiff.

Memoranda.

Docket entries.

1901, Dec. 16. Interrogatories to be propounded to Caroline Chunn, a witness on behalf of the plaintiff, and motion to issue commission to take deposition filed.
" " 31. Commission ordered to issue to R. H. Rickets Flint Hill, Va., to take the deposition of Caroline Chunn on behalf of plaintiff.
" " 31. Commission issued.
1902, Jan. 10. Deposition of Caroline Chunn on behalf of plaintiff filed.

5 *Motion to Withdraw Plea of Abatement.*

Filed February 3, 1903.

In the Supreme Court of the District of Columbia.

At Law. No. 44848.

SARAH CHUNN
vs.
THE CITY AND SUBURBAN RAILWAY OF WASHINGTON.

Now comes the defendant in the above-entitled cause, and showing to the court that its plea in abatement in this cause was made in good faith, upon the statements of the plaintiff herself, as shown by

accompanying affidavits, but that, as it is advised, the accuracy of these statements by the plaintiff will be denied by her, and her denial supported by the testimony of her mother, so that the defendant, notwithstanding the fact that its said plea is based upon the statements of the plaintiff herself as above alleged, may be unable to sustain the same, and further showing to the court that, as it is advised, it has a good defense upon the merits of the case, moves the court for leave to withdraw its plea in this cause and to plead the general issue to the plaintiff's declaration.

J. J. DARLINGTON,
R. B. BEHREND,
Attorneys for Defendant.

Messrs. Wallace and Metzger, attorneys for plaintiff:

Please take notice that the above motion will be called to the attention of circuit court No. 1, Mr. Chief Justice Bingham presiding, on Friday, February 6th, 1903, at 10 o'clock, a. m., or so soon thereafter as counsel can be heard.

J. J. DARLINGTON,
R. B. BEHREND,
Attorneys for Defendant.

Filed February 3, 1903.

DISTRICT OF COLUMBIA, *ss:*

I, Charles G. Stone, on oath say that I am in charge of the medical department of the defendant in the case of Sarah Chunn *v.* The City and Suburban Railway Company of Washington, and, in that capacity, made an examination of the plaintiff on the 13th day of October, 1900; that, in the course of my examination, I asked
6 the plaintiff how old she was, and she told me she was eighteen years of age.

CHAS. G. STONE.

Subscribed and sworn to before me this 2nd day of February, A. D. 1903.

[SEAL.] WM. CLEARY SULLIVAN,
Notary Public, District of Columbia.

Filed February 3, 1903.

DISTRICT OF COLUMBIA, *ss:*

I, George P. Hoover, on oath say, that, at the present time, I am a member of the bar of this court; that, for six years prior to the 9th day of January, 1901, I was in charge of the claims department of the City and Suburban Railway Company of Washington, and, in that capacity, investigated all claims made against the said company by persons claiming to have met with accidents while passengers on the cars of the said company, or by being struck by cars of

the said company, and, in the course of such investigation, interviewed persons so claiming to have been injured, and procured statements from them in regard to the manner in which they were injured; that, on the 9th day of January, 1901, I procured from the plaintiff in the case of Sarah Chunn *v.* The City and Suburban Railway of *Company* at law, No. 44,848, a statement of how she came to be injured, and that, in the course of such interview with her, she stated to me that she was nineteen years of age.

GEO. P. HOOVER.

Subscribed and sworn to before me this 2nd day of February, A. D. 1903.

[SEAL.] WM. CLEARY SULLIVAN,
Notary Public, District of Columbia.

Supreme Court of the District of Columbia.

FRIDAY, *March* 20, 1903.

Session resumed pursuant to adjournment, Chief Justice Bingham, presiding.

The following cases were certified to criminal court No. 2, Justice Barnard, presiding.

* * * * * * *

7 At Law. No. 44848.

SARAH CHUNN, Plaintiff,
vs.
CITY AND SUBURBAN RAILWAY OF WASHINGTON, Defendant.

Upon hearing the defendant's motion for leave to withdraw its plea in abatement, and file in lieu thereof a plea in bar, it is considered that said motion be, and the same is hereby granted upon the payment, by the defendant, of the costs of suit to date; and that the case stand continued for the term.

Plea in Bar.

Filed March 23, 1903.

In the Supreme Court of the District of Columbia.

At Law. No. 44848.

SARAH CHUNN
vs.
CITY AND SUBURBAN RAILWAY OF WASHINGTON.

Leave therefor having been first obtained, the defendant, City and Suburban Railway of Washington, herewith withdraws its plea in

abatement heretofore filed in the above entitled cause, and, in lieu thereof, says that it is not guilty as alleged in the declaration filed therein.

J. J. DARLINGTON,
R. B. BEHREND,
Attorneys for Defendant.

Joinder in Issue.

Filed April 8, 1903.

In the Supreme Court of the District of Columbia.

At Law. No. 44848.

SARAH CHUNN
v.
THE CITY AND SUBURBAN RAILWAY OF WASHINGTON.

The plaintiff joins issue upon the defendant's plea of not guilty.

VICTOR H. WALLACE,
PERCY METZGER,
Attorneys for the Plaintiff.

8 *Memorandum.*

April 22, 1903.—Verdict for defendant.

Supreme Court of the District of Columbia.

MONDAY, *June* 1, 1903.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

* * * * * * *

At Law. No. 44848.

SARAH CHUNN, Plaintiff,
vs.
CITY AND SUBURBAN RAILWAY OF WASHINGTON, Defendant.

Upon hearing the plaintiff's motion for a new trial, it is considered that the same be, and hereby is overruled, and judgment on verdict ordered: therefore it is considered that the plaintiff take nothing by her suit, and that the defendant go thereof without day, and recover against the plaintiff its costs of defense to be taxed by the clerk, and have execution thereof.

The plaintiff notes an appeal to the Court of Appeals, and the penalty of the bond on said appeal is fixed in the sum of fifty dollars.

Memorandum.

June 20, 1903.—Appeal bond filed.

Memoranda.

June 23, 1903.—Time to present bill of exceptions and file transcript extended to August 17, 1903.

Aug. 12, 1903.—Time to present bill of exceptions extended to October 15, and time to file transcript of record extended until 20 days after October 15.

Oct. 13, 1903.—Time to file transcript extended to December 1, and to settle exceptions to November 1.

Oct. 30, 1903.—Time to settle exceptions extended to November 16 and file transcript to December 16.

9 Supreme Court of the District of Columbia, November 11, 1903.

At Law. No. 44848.

SARAH CHUNN, Plaintiff,
vs.
CITY & SUBURBAN RY. CO., Def't.

Now comes here again the plaintiff by her attorneys, and tenders to the court here her bill of exceptions taken during the trial hereof, and prays that the same may be duly signed, sealed, and made part of the record, now for then, which is accordingly done.

Bill of Exceptions.

Filed November 11, 1903.

In the Supreme Court of the District of Columbia.

At Law. No. 44848.

SARAH CHUNN
vs.
THE CITY AND SUBURBAN RAILWAY OF WASHINGTON.

Be it remembered that on the trial of this cause, the plaintiff, to maintain the issue on her part joined, at the opening of her case, presented the following motion:

"The plaintiff moves the court to reconsider its order passed in this case permitting the defendant herein to withdraw its plea in abatement and file a plea in bar in lieu thereof, upon the ground that under all the circumstances of the case this said order was im-

providently passed; the plaintiff further moves the court to permit this case to be now tried under the issues joined on the defendant's said plea in abatement.

"The plaintiff produces in court the sum of $15.15 the amount of costs she received from the defendant upon its filing its plea in bar and withdrawing its plea in abatement, and declares herself ready and willing to repay the same at once to the defendant, upon the granting of this motion."

And thereupon the court overruled said motion to which action of the court the plaintiff, by her attorney, then and there excepted.

And thereupon the plaintiff to further sustain the issues on her part joined offered the testimony of the following witnesses, who having been first duly sworn, testified in substance as follows:—

SARAH CHUNN, the plaintiff, testified that she is twenty three years of age. On September 29, 1900, she was working for Mrs. Reed in Riverdale, Md. Mrs. Reed lived on the east side of the defendant's railroad tracks. On the evening of this day she left Mrs. Reed's house with the intention of coming to the city of Washington, D. C., upon one of defendant's cars. She had often done this before. She remembers a conversation with Mrs. Reed just before leaving her house. The next thing she remembers is that she was being taken from the Emergency hospital to another hospital. She has no recollection of how she was injured. She also testified as to the nature and extent of her injuries, and as to the persons who had employed her since her injury, giving their names and addresses.

On cross-examination she testified:

That she had lived with Mrs. Reed for about a year before the accident; that she came into Washington about once per week while she was there, always by the electric cars; that Mrs. Reed lived on the right hand side of both the B. and O. and electric railroad, going east; that the B. and O. is between the electric railroad and Mrs. Reed's house; that she could not give any account of her movements from the time she left Mrs. Reed's house until she came to consciousness at the Emergency hospital, and could give no reason why she could remember the conversation with Mrs. Reed, and could not remember her movements from that time until she was injured.

WILLIAM R. MOULDEN, a physician formerly employed at the Emergency Hospital, in the city of Washington, D. C., testified by deposition as to the nature and extent of the plaintiff's injuries.

CHARLES M. SIZER testified that he resides at Riverdale, Md., and is employed in a branch of the Government Printing Office in the city of Washington, D. C. He lived at Riverdale before the defendant's railroad was built there, and has lived there since then. On September 29, 1900, at the station of Riverdale, there was a board platform practically even with the tracks, built between the rails

of each track and between the two tracks of the defendant's railroad. On the west side of the west track two boards of this platform project beyond this track. The west side of the track has a kind of sink. When the car comes along the step covers that board, and you have to stand out in the mud or in that hole to get on the car. Prior to September 29, 1900, it was the custom of persons intending to take passage from Riverdale on defendant's cars running on the west track, to stand between the two tracks on this platform, and board such cars from the east side. He had often entered cars of defendant going to the city of Washington on the west track from this platform between the tracks. The servants in charge of these cars running on the west track would stop them at Riverdale, and open the doors or gates, as the case might be, and permit persons to enter them from this platform between the tracks. This had been customary ever since the road began running and up to September 29, 1900. Persons standing on the platform between the tracks at this point can see north about half a mile to a station called College, and can see south about a quarter of a mile to the block where
11 the road curves to go to Hyattsville. He had stood on the front platform of cars running toward Riverdale from the south, and could see the platform at Riverdale when the cars rounded the curve, and could distinguish people standing upon the platform, but could not tell who they were. On the evening of September 29, 1900, he was standing at the south west corner of the B and O. station at Riverdale, waiting for his wife to come from Washington on defendant's road. While standing there he saw the plaintiff and another person standing on the platform between defendant's tracks. At this time there was a car approaching Riverdale from the north on the west track, and one approaching from the south on the east track. That the car approaching on the west track slowed down to stop at Riverdale, but the one approaching on the east track did not slow down, but ran across the platform at a rapid rate of speed. His view of the girl was shut off by the passing car on the east track. When the car had passed, the girl had disappeared. He then saw an object lying between the tracks, which proved to be the girl. She was lying between 12 and 15 feet from the platform, toward the west track, between the track. There was plenty of light for him to see the girl plainly as she stood on the platform between the tracks, from where he stood at the south west corner of the B. and O. station. The car on the east track ran almost to the cross road before it stopped, between a hundred and two hundred feet beyond the platform. He saw the girl after the accident, she was unconscious and had a knot on her forehead as large as your fist. It is not exactly a platform, but the boards are put down even with the ground and it is boarded over between the two tracks; there are two boards on the outside on either side. Saw the plaintiff walk over to the cars. There was a car coming from Washington at the time and one from Berwyn. It was light enough so he could see them plainly. Just before the cars arrived he saw the plaintiff and another person standing between the tracks where they get on the

cars going toward Washington. Saw plaintiff standing there until the car coming from Washington passed between himself and her which obstructed his view. Don't know exactly how far she was from the place where she was standing after she was struck. Guesses the car stopped 100 feet or more beyond where she was standing. The car going from Washington was going very fast. I don't know exactly the speed of it. The one going toward Washington was going slow and stopped right at the platform.

On cross examination he testified:

That what he called a platform was simply some boards laid down length-wise, about two boards on either side of the outer track and the space between the tracks and rails is covered with boards; that the boards lay on the ground and sleepers of the railroad. It is not raised from the ground and is about on a level with it. The dirt may possibly be an inch lower than the boards; that
12 there is a road on the west side running parallel with the track and comes down very close to the tracks. The county road is very close to the electric road and a good many people pass backwards and forwards. The platform serves for people to walk across that place. People also drive over the railroad tracks there on these boards, but it was never intended for that. That at the time and prior to this accident people got into the cars going towards Washington from both the east and west sides, which ever side a person was on they would let them in. There were other people there at the time of the accident to get on the Washington bound car and did get on, but the only two he saw on the boards between the tracks were the plaintiff and Mr. Hogan. The other people had not gone out. First saw the plaintiff that night between the two tracks, on the boards, she was standing still. When he saw her standing between the tracks neither car had reached the point where she was, but both were approaching it and near the place; that a person standing where she was could see at least a quarter of a mile in the direction of Washington and at least the same distance in the other direction.

JOHN H. HOGAN testified that he lived at Riverdale, Md., and has resided there for ten years, and was residing there on the 29th day of September, 1900. On the west side of the west or south bound track of defendant's railroad was an incomplete dirt roadway; this roadway was not in very good condition for passing across from the roadway to the station. So far as his practice and observation went he and others entered the cars from the east side—all cars going both ways. On the evening of the 29th of September, 1900, he was at the B. and O. station at Riverdale. He intended to take a car on defendant's railroad for Washington. The plaintiff was also at the B. and O. station at this time. When the car on the west track coming south toward Washington came in sight, he went to the platform between the tracks of the defendant's road, as he was in the habit of doing. He incidentally noticed the approach of the car from Washington at about the same time, and realized that he would have to hold himself strictly in the

centre of the two tracks, and he stood in that position. The plaintiff also went to this platform between the tracks about the same time. He stood at the south end of the platform, and the plaintiff stood toward the north end. He saw her standing there. In about from half a minute to a minute a car coming from the south toward the north on the east track passed. It did not stop at the platform. He heard a shock and looked and did not see anything of the plaintiff. At this time the south bound car had reached the platform. It stopped there. The car running north passed the platform at from about 12 to 15 miles an hour. It stopped between 60 and 90 feet beyond the platform. The plaintiff was found unconscious lying 10 to 15 feet from the north end of the platform, be-
13 tween the tracks, near the west track. A person standing on the platform between the tracks could see a hundred yards in either direction, the trolley poles would obscure a further view. The track curves toward the south. When the cars of the defendant pass each other at the station platform at Riverdale there is about three feet ten inches space between them. At the time the accident took place it was light enough to recognize a person 100 yards away.

On cross examination he testified:

That he did not see the plaintiff approach the tracks, but saw her standing on the north end of the platform between the tracks while he was standing there waiting for the Washington bound car to come up; that he was waiting there from a half a minute to a minute, when the car came. That the curve west of Riverdale is not much of a curve, not enough to hide a car. That standing between the tracks at the point in question you can see a car for a quarter of a mile approaching from either direction. That the car he was to take reached the platform first; that it had stopped or nearly so when he heard the concussion.

In response to questions by the court the witness said that he was standing between the two cars when the car that was going from Washington passed, and that there was ample room to stand if you were thinking about what you were doing; it was over three feet.

Frank E. Jett, a physician employed at the Washington Asylum hospital, identified certain records of that hospital relating to the plaintiff, and these records were then read in evidence. They showed the plaintiff's condition and treatment while in that hospital.

Fannie M. Reed testified that she lived in Riverdale, Md., on September 29, 1900, and that the plaintiff was in her employ at that time. On that evening the plaintiff left her house saying that she was coming to the city of Washington. She next saw the plaintiff, at the B. and O. station on that same evening. This was after the accident, and the plaintiff was then unconscious. She, witness, had often taken cars on the defendant's road to the city of Washington running on the west track, and in so doing had stood on the platform between the tracks. She also testified as to visits to plaintiff at the hospital, and as to plaintiff's condition after she left the hospital.

RICHARD CONNOR testified that he lives in the city of Washington, D. C. A few days previous to the trial of this case, he went to the station at Riverdale, Md., at the request of the plaintiff's attorney and made some measurements. He found the platform located between the defendant's tracks at that point to be 30 feet long. The
14 distance between the inner rails of the two tracks is 7 feet, 10 inches. There is a trolley post situated north of the platform 31 feet, 2 inches. It is 67 feet from the middle of the platform to the south west corner of the B. and O. station. He had placed a stick against the step of one of defendant's cars, and measured from this stick to the track, and found that this step projected 2 feet, 2 inches beyond the rail of the track. This car was one of those large green cars that run on defendant's railroad. A person standing between the tracks can see north about a half a mile, and can see south about a quarter of a mile. While standing on the platform witness saw a person south about that distance.

And thereupon the plaintiff announced that her testimony was closed.

This being all the evidence in the case, the defendant thereupon moved the court to direct a verdict in its favor. This motion was, after argument by counsel, granted by the court and a verdict directed in favor of the defendant. To this ruling of the court the plaintiff then and there duly excepted, and asked the court to sign, seal and enrol- this her bill of exceptions, which is accordingly done, this 11th day of November, 1903, now for then.

JOB BARNARD, *Justice.* [SEAL.]

O. K.,
C. C. COLE.

Portions of Record to be Printed on Appeal.

Filed December 8, 1903.

At Law. No. 44848.

SARAH CHUNN
v.
THE CITY AND SUBURBAN RAILWAY OF WASHINGTON.

Declaration.
Plea in abatement.
Joinder in issue.
Docket entries in this case as follows:

1901, Dec. 16. Interrogatories to be propounded to Caroline Chunn, a witness on behalf of the plaintiff, and motion to issue commission to take deposition filed.

" Dec. 31. Commission ordered to issue to R. H. Rickets, Flint Mill, Va., to take the deposition of Caroline Chunn on behalf of plaintiff.

" Dec. 31. Commission issued.

1902, Jan. 10. Deposition of Caroline Chunn on behalf of plaintiff filed.

15 Motion to withdraw plea in abatement and affidavits of Stone and Hoover in support of same.

Order permitting withdrawal of plea in abatement.

Plea in bar.

Joinder in issue on same.

Judgment.

Appeal and order for citation.

Memorandum of citation.

Memorandum of various orders extending time for filing bill of exceptions and transcript of the record.

Bill of exceptions.

Memorandum of bond.

VICTOR H. WALLACE,
Attorney for Plaintiff.

Order Extending Time to File Record.

Filed December 14, 1903.

In the Supreme Court of the District of Columbia.

At Law. No. 44848.

SARAH CHUNN
vs.
THE CITY AND SUBURBAN RAILWAY OF WASHINGTON.

It is this 14th day of December, 1903, ordered that the time for filing the transcript of the record in this case with the clerk of the Court of Appeals be, and the same is hereby extended until the 16th day of January, 1904.

JOB BARNARD, *Justice.*

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 24, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this record, in cause No. 44848, at law, wherein Sarah Chunn is plaintiff, and The City and Suburban Railway of Washington is defendant, as the same remains upon the files and of record in said court.

16 In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 13th day of January, A. D. 1904.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1393. Sarah Chunn, appellant, *vs.* The City and Suburban Railway of Washington. Court of Appeals, District of Columbia. Filed Jan. 14, 1904. Henry W. Hodges, clerk.

17 FRIDAY, *April 8th, A. D.* 1904.

No. 1393.

SARAH CHUNN, Appellant,
vs.
THE CITY AND SUBURBAN RAILWAY OF WASHINGTON.

The argument in the above entitled cause was commenced by Mr. Percy Metzger, attorney for the appellant.

TUESDAY, *April 12th, A. D.* 1904.

No. 1393.

SARAH CHUNN, Appellant,
vs.
THE CITY AND SUBURBAN RAILWAY OF WASHINGTON.

The argument in the above entitled cause was continued by Mr. Percy Metzger, attorney for the appellant, and by Messrs. B. W. Parker and C. C. Cole, attorneys for the appellee, and was concluded by Mr. V. H. Wallace, attorney for the appellant.

18 No. 1393.

SARAH CHUNN, Appellant,
vs.
THE CITY AND SUBURBAN RAILWAY OF WASHINGTON.

Opinion.

Mr. Justice SHEPARD delivered the opinion of the court:

The appellant began this action August 3, 1901, to recover damages for personal injuries.

August 29, 1901, defendant pleaded the infancy of the plaintiff in abatement of the action. The next proceeding was a motion by defendant for leave to withdraw the plea in abatement and plead in

bar, which was granted March 20, 1903, conditioned upon the payment of all costs to date. The motion to withdraw was supported by an affidavit showing that the plea in abatement had been filed in good faith, founded upon a statement made by plaintiff to the effect that she was but 19 years of age.

The defendant having then pleaded not guilty, the plaintiff joined issue and the trial was had June 1, 1903.

The plaintiff moved the court to reconsider the order permitting the leave to plead in bar, because improvidently passed, and demanded trial on the plea in abatement. In connection with this motion a tender was made of the sum of $15.15, the same being the sum collected by plaintiff as costs under the said order. The court overruled the motion, and plaintiff excepted. Plaintiff then offered the following evidence as recited in her bill of exceptions:

"Sarah Chunn, the plaintiff, testified that she is 23 years of
19 age. On September 29, 1900, she was working for Mrs. Reed in Riverdale, Md. Mrs. Reed lived on the east side of the defendant's railroad tracks. On the evening of this day she left Mrs. Reed's house with the intention of coming to the city of Washington, D. C., upon one of defendant's cars. She had often done this before. She remembers a conversation with Mrs. Reed just before leaving her house. The next thing she remembers is that she was being taken from the Emergency Hospital to another hospital. She has no recollection of how she was injured. She also testified as to the nature and extent of her injuries, and as to the persons who had employed her since her injury, giving their names and addresses.

"On cross-examination she testified that she had lived with Mrs. Reed for about a year before the accident; that she came into Washington about once per week while she was there, always by the electric cars; that Mrs. Reed lived on the right-hand side of both the B. and O. and electric railroad, going east; that the B. and O. is between the electric railroad and Mrs. Reed's house; that she could not give any account of her movements from the time she left Mrs. Reed's house until she came to consciousness at the Emergency Hospital, and could give no reason why she could remember the conversation with Mrs. Reed, and could not remember her movements from that time until she was injured.

"William R. Moulden, a physician formerly employed at the Emergency Hospital, in the city of Washington, D. C., testified by deposition as to the nature and extent of the plaintiff's injuries.

"Charles M. Sizer testified that he resides at Riverdale, Md., and is employed in a branch of the Government Printing Office, in the city of Washington, D. C. He lived at Riverdale before the defendant's railroad was built there, and has lived there since then. On September 29, 1900, at the station of Riverdale, there was a board platform practically even with the tracks, built between the rails of each track and between the two tracks of the defendant's railroad. On the west side of the west track two boards of this platform project beyond this track. The west side of the track has a kind of sink. When the car comes along the step covers that board, and you have to stand out in the mud or in that hole to get on the car. Prior to

September 29, 1900, it was the custom of persons intending to take passage from Riverdale on defendant's cars running on the west track, to stand between the two tracks on this platform, and board such cars from the east side. He had often entered cars of defendant going to the city of Washington on the west track from this platform between the tracks. The servants in charge of these cars running on the west track would stop them at Riverdale, and open the doors or gates, as the case might be, and permit persons to enter them from this platform between the tracks. This had been customary ever since the road began running and up to September 29, 1900. Persons standing on the platform between the tracks at this point can see north about half a mile to a station called College, and can see south about a quarter of a mile to the block where the road curves to go to Hyattsville. He had stood on the front platform of cars running toward Riverdale from the south, and could see the platform at Riverdale when the cars rounded the curve, and could distinguish people standing upon the platform, but could not tell who they were. On the evening of September 29, 1900, he was standing at the southwest corner of the B. and O. station at Riverdale, waiting for his wife to come from Washington on defendant's road. While standing there he saw the plaintiff and another person standing on the platform between defendant's tracks. At this time there was a car approaching Riverdale from the north on the west track, and one approaching from the south on the east track. That the car approaching on the west track slowed down to stop at Riverdale, but the one approaching on the east track did not slow down, but ran across the platform at a rapid rate of speed. His view of the girl was shut off by the passing car on the east track. When the car had passed, the girl had disappeared. He then saw an object lying between the tracks, which proved to be the girl. She was lying between 12 and 15 feet from the platform, toward the west track, between the track. There was plenty of light for him to see the girl plainly as she stood on the platform between the tracks, from where he stood at the southwest corner of the B. and O. station. The car on the east track ran almost to the cross road before it stopped, between a hundred and two hundred feet beyond the platform. He saw the girl after the accident; she was unconscious and had a knot on her forehead as large as your fist. It is not exactly a platform, but the boards are put down even with the ground and it is boarded over between the two tracks; there are two boards on the outside on either side. Saw the plaintiff walk over to the cars. There was a car coming from Washington at the time and one from Berwyn. It was light enough so he could see them plainly. Just before the cars arrived he saw the plaintiff and another person standing between the tracks where they get on the cars going toward Washington. Saw plaintiff standing there until the car coming from Washington passed between himself and her, which obstructed his view. Don't know exactly how far she was from the place where she was standing after she was struck. Guesses the car stopped 100 feet or more beyond where she was standing. The car going from Washington was going very fast. I don't know exactly the speed of it. The one

going toward Washington was going slow and stopped right at the platform.

"On cross-examination he testified that what he called a platform was simply some boards laid down lengthwise, about two boards on either side of the outer track, and the space between the tracks and rails is covered with boards; that the boards lay on the ground and sleepers of the railroad. It is not raised from the ground and is about on a level with it. The dirt may possibly be an inch lower than the boards; that there is a road on the west side running parallel with the track and comes down very close to the tracks. The county road is very close to the electric road and a good many people pass backwards and forwards. The platform serves for people to walk across that place. People also drive over the railroad tracks there on these boards, but it was never intended for that. That at the time and prior to this accident people got into the cars going towards Washington from both the east and west sides; which ever side a person was on they would let them in. There were other people there at the time of the accident to get on the Washington bound car and did get on, but the only two he saw on the boards between the tracks were the plaintiff and Mr. Hogan. The other people had not gone out. First saw the plaintiff that night between the two tracks, on the boards, she was standing still. When he saw her standing between the tracks neither car had reached the point where she was, but both were approaching it and near the place; that a person standing where she was could see at least a quarter of a mile in the direction of Washington and at least the same distance in the other direction.

"John H. Hogan testified that he lived at Riverdale, Md., and has resided there for ten years, and was residing there on the 29th day of September, 1900. On the west side of the west or south bound track of defendant's railroad was an incomplete dirt roadway; this roadway was not in very good condition for passing across from the roadway to the station. So far as his practice and observation went he and others entered the cars from the east side—all cars going both ways. On the evening of the 29th of September, 1900, he was at the B. and O. station at Riverdale. He intended to take a car on defendant's railroad for Washington. The plaintiff was also at the B. & O. station at this time. When the car on the west track coming south toward Washington came in sight, he went to the platform between the tracks of the defendant's road, as he was in the habit of doing. He incidentally noticed the approach of the car from Washing at about the same time, and realized that he would have to hold himself strictly in the center of the two tracks, and he stood in that position. The plaintiff also went to this platform between the tracks about the same time. He stood at the south end of the platform, and the plaintiff stood toward the north end. He saw her standing there. In about from half a minute to a minute a car coming from the south toward the north on the east track passed. It did not stop at the platform. He heard a shock and looked and did not see anything of the plaintiff. At this time the south-bound car had reached the platform. It stopped there. The car running north passed the

platform at from about 12 to 15 miles an hour. It stopped between 69 and 90 feet beyond the platform. The plaintiff was found unconscious lying 10 to 15 feet from the north end of the platform, between the tracks, near the west track. A person standing on the platform between the tracks could see a hundred yards in either direction, the trolley poles would obscure a further view. The track curves toward the south. When the cars of the defendant pass each other at the station platform at Riverdale there is about three feet ten inches space between them. At the time the accident took place it was light enough to recognize a person 100 yards away.

"On cross-examination he testified: That he did not see the plaintiff approach the tracks, but saw her standing on the north end of the platform between the tracks while he was standing there waiting for the Washington-bound car to come up; that he was waiting there from a half minute to a minute, when the car came. That the curve west of Riverdale is not much of a curve, not enough to hide a car. That standing between the tracks at the point in question you can see a car for a quarter of a mile approaching from either direction. That the car he was to take reached the platform first; that it had stopped or nearly so when he heard the concussion.

"In response to questions by the court the witness said that he was standing between the two cars when the car that was going from Washington passed, and that there was ample room to stand if you were thinking about what you were doing; it was over three feet.

"Frank E. Jett, a physician employed at the Washington Asylum Hospital, identified certain records of that hospital relating to the plaintiff, and these records were then read in evidence. They showed the plaintiff's condition and treatment while in that hospital.

"Fannie M. Reed testified that she lived in Riverdale, Md., on September 29, 1900, and that the plaintiff was in her employ at that time. On that evening the plaintiff left her house saying that she was coming to the city of Washington. She next saw the plaintiff, at the B. & O. station on that same evening. This was after the accident, and the plaintiff was then unconscious. She, witness, had often taken cars on the defendant's road to the city of Washington running on the west track, and in so doing had stood on the platform between the tracks. She also testified as to visits to plaintiff at the hospital, and as to plaintiff's condition after she left the hospital.

"Richard Connor testified that he lives in the city of Washington, D. C. A few days previous to the trial of this case he went to the station at Riverdale, Md., at the request of the plaintiff's attorney and made some measurements. He found the platform located between the defendant's tracks at that point to be 30 feet long. The distance between the inner rails of the two tracks is 7 feet 10 inches. There is a trolley post situated north of the platform 31 feet, 2 inches. It is 67 feet from the middle of the platform to the southwest corner of the B. and O. station. He had placed a stick against the step of one of defendant's cars, and measured from this stick to the track, and found that this step projected 2 feet, 2 inches beyond the rail of the track. This car was one of those large green cars that run on defendant's railroad. A person standing between the tracks can see north about a half a mile, and can see south about

a quarter of a mile. While standing on the platform witness saw a person south about that distance."

Upon the conclusion of this evidence, the court sustained a motion made by defendant to direct a verdict in its favor; and from judgment thereon the appeal has been taken.

1. The grant or refusal of leave to amend is a power intrusted to the trial courts that injustice and hardship may be prevented and the merits of a case fairly tried. Whether in the particular
21 instance the leave should be granted or refused, is a matter within the discretion of the trial court and is not reviewable in the appellate court. Germ. Evang. Soc. *v.* Prospect Hill Cemetery, 2 App. D. C. 310; Brown *v.* B. & O. R. R. Co., 6 App. D. C. 237, 242; Morris *v.* Wheat, 11 *Idem*, 201. That the amendment may relate to the withdrawal of a plea in bar and its substitution by one in abatement, or the reverse, does not alter the rule. Eberly *v.* Moore, 24 How. 147, 158; Spencer *v.* Lopsley, 20 How. 264, 267.

2. The questions arising under the evidence offered by plaintiff were, first, whether it was sufficient to warrant the interference of defendant's negligence, and, if so, whether it plainly appeared therefrom that, notwithstanding that negligence, the plaintiff's injuries were the result of her own want of ordinary care under all the circumstances.

The contention of the appellant rests upon the proposition, that running the outgoing car at a high rate of speed and not reducing the same to an easily controllable rate, or stopping it altogether, at the point where the incoming car, for which plaintiff waited, was about to stop to take on passengers, constituted culpable negligence. The case upon which the appellant most strongly relies for the principle to support her contention on both points, is that where a passenger, who had waited at a station for a local train going in one direction was run down and killed by an express train going in the other, whilst he was crossing the tracks to take his own train which was just coming to a stop at the platform on the opposite side. Warner *v.* B. & O. R. Co., 168 U. S. 339, 344. That, being a steam railway, maintained stations at which the local trains, at least, always stopped for passengers, though the express trains did not.

In reasonable anticipation of the dangers attending the constant and forced crossing of the tracks at such stations, the defendant, itself, had promulgated a rule—though the same had been generally disregarded by its employees as too restrictive of rapid transit—prohibiting the running of trains past a station when another train might be there receiving and discharging passengers. Boentgen *v.* R. R. Co., 55 N. Y. Supp. 847, was that of a street railway operated under a like rule. The defendant in this case—an electrical street railway—maintained no stations, but stopped at street inter-sections and other places, including the one in question, upon signals given by passengers or persons waiting at the same. The evidence concerning the platform so often mentioned in the testimony is very unsatisfactory. It does not seem to be a platform for the use of passengers in getting on and off the cars, but consisting of planks laid upon the

ground both within the rails of each track and the space between the said tracks would seem to be for the purpose of a crossing for vehicles as well as persons at the point. The appellee had no rule like the one mentioned in the cases cited, nor is there any evidence of its ordinary or customary practice in that regard. It was well aware, however, that persons frequently stood in the space mentioned when waiting to take the car for the city, and had given sanction to the practice by opening the car gates and permitting them to enter from that side.

Whether then, under all the circumstances, it was an act of negligence to run the outgoing car past the place when people could be seen standing in the space waiting for the other car, and in such proximity to the track as to indicate the special danger of one of them, is a question proper for the determination of the jury ordinarily.

3. The question of contributory negligence remains to be considered, for if that has been so plainly shown as to make it a matter of law for the determination of the court, the negligence of the defendant is immaterial.

Carefully considering the evidence in the light of all reasonable inferences that can be drawn from its undisputed facts, our conclusion is that the plaintiff's injuries were the result of her own want of ordinary care. The distance between the inner rails of the two tracks was 7 feet and 10 inches, and each car projected 2 feet and 2 inches beyond the rail. Consequently the clear space between uniting cars was 3 feet and a half. A car approaching in either direction could readily be seen a quarter of a mile away. One other person stood in the said space in safety while the car passed. He saw it coming but did not leave the space. He saw plaintiff beyond him but was unable to say what she was doing when struck. This witness said that there was "ample room to stand if you were thinking about what you were doing," and his safety demonstrated the truth of his statement.

Plaintiff had no recollection of what she was doing or where she was standing at the time. It does not appear that she was deficient in intellect, and she ought to have seen the car and exercised her thought as did her witness. Edgerton *v.* R. R. Co., 6 App. D. C. 516, 523; Harten *v.* Railway Co., 18 App. D. C. 260, 265; Barrett *v.* Columbia Railway Co., 20 App. D. C. 381, 390; Stewart *v.* Railway Co., 31 W. L. R. 748; see, also, Miller *v.* St. Paul City Ry. Co., 42 Minn. 454. The facts of that case are almost identical with those shown in this record; what little difference there is made that, if anything, more favorable to the plaintiff. The defendant had permitted the practice of entering the cars from the space between the tracks which was paved, while the outer side was not, and yet there were but 2 feet of clear space between passing cars. Moreover, the gripman of the cable car which ran down the plaintiff testified that he saw the plaintiff in the point of danger and did not moderate the speed of his car. The appellate court reversed a judgment for the plaintiff on the ground that there could be no

other reasonable conclusion than that his own negligence was the cause of his injury.

Being of the opinion that the trial court was right in directing the verdict upon the ground of the plaintiff's contributory negligence, the judgment will be affirmed with costs. It is so ordered. Affirmed.

22 WEDNESDAY, *May 4th, A. D.* 1904.

No. 1393. April Term, 1904.

SARAH CHUNN, Appellant,
vs.
THE CITY AND SUBURBAN RAILWAY OF WASHINGTON.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be and the same is hereby, affirmed with costs.

Per MR. JUSTICE SHEPARD.

May 4, 1904.

TUESDAY, *May 1st, A. D.* 1906.

No. 1393.

SARAH CHUNN, Appellant,
vs.
THE CITY AND SUBURBAN RAILWAY OF WASHINGTON.

On motion of Mr. Percy Metzger, of counsel for the appellant, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States, issue, and the bond for costs is fixed at the sum of three hundred dollars.

23 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Sarah Chunn, Appellant and The City and Suburban Railway of Washington, Appellee a manifest error hath happened, to the great damage of the said Appellant as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further

to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 1st day of May, in the year of our Lord one thousand nine hundred and six.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

Allowed by—
—— ——.

24 (*Bond on Writ of Error.*)

Know all men by these presents, That we, Sarah Chunn, as principal, and The Title Guaranty and Surety Company, as surety, are held and firmly bound unto The City and Suburban Railway of Washington in the full and just sum of Three Hundred — to be paid to the said City and Suburban Railway of Washington, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 3d day of Ma in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between Sarah Chunn, Appellant, and The City and Suburban Railway of Washington a judgment was rendered against the said Sarah Chunn and the said Sarah Chunn having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said City and Suburban Railway of Washington citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said Sarah Chunn shall prosecute said writ of error to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

her
SARAH x CHUNN. [SEAL.]
mark.

THE TITLE GUARANTY & SURETY COMPANY, [SEAL.]
By GEO. E. JOHNSON, *Attorney-in-fact.* [SEAL.]
[Seal of The Title Guaranty & Surety Company.]

Sealed and delivered in the presence of—
H. W. HODGES.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the
District of Columbia.

[Endorsed:] No. 1393 Sarah Chunn Appellant *vs.* The City and Suburban Railway of Washington Bond on Writ of Error to Supreme Court U. S. Court of Appeals District of Columbia Filed May 3, 1906 Henry W. Hodges Clerk.

25 UNITED STATES OF AMERICA, *ss:*

To the City and Suburban Railway of Washington, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Sarah Chunn — plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard Chief Justice of the Court of Appeals of the District of Columbia, this 3d day of May, in the year of our Lord one thousand nine hundred and six.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted.
J. J. DARLINGTON,
Attorney for Defendant in Error.

May 3, 1906.

[Endorsed:] Court of Appeals, District of Columbia. Filed May 3 1906 Henry W. Hodges, Clerk.

26 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 25, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals, in the case of Sarah Chunn, Appellant, *vs.* The City and Suburban Railway of Washington No. 1393, April Term, 1906, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 4th day of May A. D. 1906.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 20,272. District of Columbia court of appeals. Term No. 307. Sarah Chunn, plaintiff in error, *vs* The City and Suburban Railway of Washington. Filed May 29th, 1906. File No. 20,272.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 307.

SARAH CHUNN, PLAINTIFF IN ERROR,

vs.

THE CITY AND SUBURBAN RAILWAY OF WASHINGTON.

In Error to the Court of Appeals of the District of Columbia.

BRIEF FOR THE PLAINTIFF IN ERROR.

Statement of the Case.

On the 29th day of September, 1900, the defendant, the City and Suburban Railway of Washington, operated an electric railway between Berwyn, Md., and Washington, D. C. Riverdale, Md., was an intermediate station on defendant's road. The plaintiff, Sarah Chunn, who then lived at Riverdale, on the evening of this day, but before it was dark, wished to take passage on a car of defendant from Riverdale to Washington. With this end in view, she stood upon a platform between the east and west tracks of the defendant's railway. This was the usual and customary place for persons intending to

take passage on defendant's cars for Washington to stand, and this custom had been in existence and had been recognized and acquiesced in by the defendant and its employees ever since the road began running. The car the plaintiff was to take ran on the west track and approached Riverdale from the north.

As the car plaintiff was to take approached on the west track another car of the defendant came up from the south on the east track. A person in the position occupied by a motorman of a car coming from the south could see a person standing where plaintiff then stood for a quarter of a mile before reaching her, and from the point where plaintiff stood there was a plain view for another half mile north.

The car coming from the north slowed down to stop at the platform, and at the same time the car from the south rushed across the platform without slowing down, and going "very fast." The plaintiff was caught between the cars and struck by the car from the south and hurled from 10 to 15 feet beyond the end of the platform, out between the tracks. Her skull was thereby fractured, and she was otherwise seriously injured. The evidence relating to her injuries is not set out in the bill of exceptions, but it is alleged in the declaration that by reason of this accident the plaintiff's mind was permanently impaired, and that she suffered other injury and damage. The car that struck her ran from 60 to over 100 feet beyond the platform before it was stopped.

Suit to recover damages for this injury was instituted on the 3d day of August, 1901. On the 29th day of August, 1901, the defendant filed a plea in abatement, setting out that the plaintiff "at the time of the commencement of the suit" was under 21 years of age. This was supported by the affidavit of James B. Lackey. Issue was joined on this plea on August 31, 1901. On December 16, 1901, a commission was issued to take the testi-

mony of Caroline Chunn, the mother of the plaintiff, as to the issue of age under the plea in abatement. The defendant was regularly served with copies of the interrogatories, and had due notice of the taking of the deposition. This deposition was returned and filed on January 10, 1902, and under the rules of the Supreme Court of the District of Columbia publication thereof was immediately made by the clerk of that court.

> See Equity Rule 67, of the Rules of the Supreme Court, D. C., which applies to depositions taken in cases at law as well as in equity.

On Thursday, the 29th day of January, 1903, this case was placed on the call for hearing on February 2, 1903, the following Monday. On February 3, 1903, more than seventeen months after issue joined on the plea in abatement, and nearly fourteen months after the issuance of the commission to take the deposition under this plea, and five days after the case had been placed on the call for trial under this plea, the defendant filed a motion to withdraw this plea, supported by two affidavits (Rec., p. 4). This motion was granted on March 20, 1903. The plaintiff thereupon immediately applied to the Court of Appeals for a special appeal from this order, which was denied on the 26th day of March, 1903. This application for a special appeal was known as "Original No. 140" on the dockets of the Court of Appeals of the District of Columbia. This application and the action denying it, form no part of the record in this case.

A plea in bar was then filed, and issue joined thereon, and the case came to trial on April 21, 1903. At the opening of the case the plaintiff made a motion asking the court to reconsider its order permitting the defendant to withdraw its plea in abatement and to permit the case to be tried under the issue joined on the plea in abatement. This motion was overruled, and an exception

noted (Rec., p. 8). The plaintiff then introduced her testimony, and at its close the court, upon motion of the defendant, directed a verdict for the defendant. To this ruling of the court an exception was noted (Rec., p. 13). The usual steps were then taken incident to bringing the case before the Court of Appeals.

The case was argued in that court on the 12th day of April, 1904, and on the 4th day of May following, the court affirmed the judgment appealed from, with costs (Rec., p. 22).

A writ of error removing the cause into this court was granted on the 1st day of May, 1906 (Rec., p. 22).

Specifications of Error.

The court below erred:

1. In affirming the action of the trial court permitting the plaintiff to withdraw its plea in abatement after evidence had been taken under the issue joined upon that plea.

2. In affirming the action of the trial court denying the plaintiff's motion to reconsider the order permitting the withdrawal of the plea in abatement, and refusing to permit the case to be tried under the issue joined on that plea.

3. In affirming the action of the trial court directing a verdict for the defendant, and thus denying the plaintiff in error the right of trial by jury.

ARGUMENT.

I AND II.

Lord Holt said in the case of Crosse *vs.* Bilson, 2 Ld. Raymond, 1022:

> "When the defendant pleads a matter of fact in abatement, and the plaintiff in his replication

> traverses or takes issue thereon, there it is proper for him to pray damages, because if it be found against the defendant, judgment final shall be given."

And the Encyclopedia of Pleading and Practice, vol. I, page 31, title Abatement, states the law to be that:

> "Where an issue of fact joined on a plea of abatement is found in favor of the plaintiff the effect of it is an admission of the merits of the plaintiff's claim, and the judgment thereon is final in favor of the plaintiff, and the jury which determines the issue should determine the plaintiff's damages."

How firmly these principles are established in law is evidenced by the following cases and text-books, all of which have been carefully examined:

Bonner *vs.* Hall, 1 Ld. Raymond, 338.
Eichorn *vs.* Le Maitre, 2 Wilson, 367.
Thompson *vs.* Colier, Yelverton, 112.
Amcots *vs.* Amcots, Thomas Raymond, 118.
Bowen *vs.* Shapcott, 1 East, 542.
Foxwist *vs.* Tremaine, 3 Wms. Saunders, note 3, page 211.
Hollingsworth *vs.* Duane, Wallace C. C., 51.
National Association *vs.* Spiro, 78 Fed., 775.
Alling *vs.* Shelton, 16 Conn., 436.
Goggin *vs.* O'Donnell, 62 Ill., 66.
The Italian, etc., Colony *vs.* Pease, 194 Ill., 98.
Thompson *vs.* Greenwood, 38 Ind., 327.
Moore *vs.* Morton, 1 Bibb, 234 (Ky.).
Good *vs.* Lehan, 8 Cush. (Mass.), 301.
Commonwealth *vs.* Carr, 114 Mass., 280. A criminal case.
Dodge *vs.* Morse, 3 N. H., 232.
Chase *vs.* Deming, 42 N. H., 274.
Haight *vs.* Holley, 3d Wend. (N. Y.), 258.

Mechanics Bank *vs.* Dakin, 24 Wend. (N. Y.), 411.
Myers et al. *vs.* Erwin and Co., 20 Ohio, 382.
Mehaffy *vs.* Shane, 2 Penrose and Watts (Pa.), 361.
Straus *vs.* Weil, 5 Cold. (Tenn.), 120.
Vanderberg et al. *vs.* Clark, 22 Vt., 185.
Tidd's Practice, vol. 1, 640.
Comyn's Digest, title Abatement, page 143.
Gould's Pleading, page 277, sec. 159.
Chitty's Pleading, vol. 1, page 455.
Evan's Practice, 195.
Cox's Practice, page 55.
Stephen on Pleading, 133.
See, also, forms of postea, judgment, and execution given for plaintiff, in Archibold's forms.

Now the minute the plaintiff joined issue on the defendant's plea in abatement, the negligence of the defendant was admitted, and the question of contributory negligence passed out of the case; all the plaintiff was bound to prepare to prove at the trial were the facts relating to her age, and the amount of damage she suffered; every other material fact in her case was admitted by the defendant.

For seventeen months the defendant lulled the plaintiff with this belief, and without protest of any kind, and without any intimation that there would be a request for a withdrawal of the plea in abatement, it permitted the plaintiff to take evidence under this plea. Not until the case was actually called for trial, and when the plaintiff was present in court ready to go ahead and prove her case under this plea did the defendant give the least notice that it desired to withdraw this plea. It was then stated by counsel for the defendant in open court that he intended to file a motion for leave to withdraw this plea. This motion was afterwards filed and granted.

The only remedy open to the plaintiff upon the grant-

ing of this motion was a special appeal to the Court of Appeals, which was immediately prayed, and subsequently denied. The plaintiff, however, did not waive the question, but again raised it by the motion set out in the bill of exceptions before any evidence was offered at the trial.

The only reason given by the defendant for its request to withdraw its plea in abatement was that it had ascertained from the testimony taken under the issue joined upon this plea, which it had voluntarily selected as the ground of its defense, that this defense in abatement was not tenable, and that its case was lost. (See motion for withdrawal of plea, Record p. 4 and 5).

Now the defendant had voluntarily selected this issue of fact as to the age of the plaintiff, as its defense. The action of the plaintiff in joining issue on the plea in abatement as to her age, gave notice that she intended to contest the truth of the fact it alleged; and the commission to take the testimony of her mother on this issue, was notice that she intended to support the denial of the allegation of the plea in abatement by testimony. If defendant had not filed this plea in good faith, and did not intend to rely upon it, application should have been made at this time to withdraw the plea. We admit that had application been then made, it would have been in the discretion of the trial court to permit the withdrawal of this plea, and the substitution of one in bar.

The defendant, however, did nothing of the kind. It took chances, and gambled with the court and with the plaintiff; it waited until the testimony under the issue in abatement was taken and publication made, and when it then ascertained that the evidence was adverse to it, and that judgment of *quod recuperet* must go against it, it made application to withdraw its plea in abatement and substitute one in bar. Nor did it even then make

this application promptly, but waited for more than a year after the return and publication of the deposition before making application to change its plea.

The affidavits of Stone and Hoover filed in support of the application to withdraw the plea in abatement state nothing but facts which were confessedly within the knowledge of the plaintiff before the testimony was taken under the issue in abatement, and for more than two years before the application to withdraw the plea was made.

The contention of the plaintiff in error is that application to withdraw this plea was not seasonably made, and that after testimony was taken under the issue raised by this plea, it ceased to be a matter within the discretion of the trial court to permit this plea to be withdrawn on such a showing as was made by the defendant in its application for withdrawal. She contends that the action of the trial court in permitting the withdrawal of the plea in abatement was a gross abuse of discretion amounting to reversible error, and that the Court of Appeals erred in affirming the action of trial court in this respect.

The Court of Appeals has treated this question rather lightly, as will be seen by a reference to its opinion (Rec., p. 20). That court has cited several cases to the effect that the amendment, withdrawal, and substitution of pleas are matters resting in the discretion of the trial court. We do not question the soundness of the cases cited, we only say that they do not apply to this case.

The question the plaintiff in error wishes determined is, has a trial court the right to permit the withdrawal of a plea in abatement voluntarily selected by the defendant as the ground of its defense, after testimony has been taken under the issue raised by the plea, for no other reason than that the defendant after an examination of this testimony finds that it can not maintain the ssue it has itself selected? Especially where this appli-

cation is not made for more than a year after the testimony has been published.

What the plaintiff in error wishes to know is, when does the discretion of the trial court cease; if not after testimony taken, does it still remain after argument, or after the case is in the hands of the jury, or after adverse verdict? The principle involved in each instance is the same.

In support of the contentions raised by the 1st and 2d specifications of error, we cite—

Yeatman *vs.* Henderson, Fed. Case No. 18, 132.
Robbins *vs.* Treadway, 2 J. J. Marsh. (Ky.), 540.

III.

As to the third assignment of error, the undisputed facts are that a woman desiring to take passage on one of defendant's cars went to a place designated by custom as the proper place for passengers to stand who were to take passage on these cars, and while standing there, and in plain view of the motorman of an approaching car, who could see that she was about to be caught between his car and another approaching in the opposite direction, was deliberately run down by him and injured. Surely the jury should have been permitted to pass upon the question of his negligence.

This woman was standing upon the platform of the defendant, and by its implied invitation, it was therefore the duty of the defendant to see that she was not injured. It was urged below that there was no evidence that the defendant ever built this platform. This is answered by the language used in the charge to the jury in the case of Betts *vs.* The R. R. Co., 191 Pa. St., 575, cited, with approval, by the Supreme Court on appeal. In this case a railroad company was in the habit of receiving and discharging passengers from certain trains between tracks in the streets of a city. While attempting to board one of these trains a person was injured by

another train passing on a parallel track. It was there said:

> "Whether that is a public street or not, they (the defendant's servants) had used the ground there for the purposes of a platform, not only where the platform was, adjoining the station, but also the ground east of the main track of defendant company. If it had been their custom to so use that ground, then, as far as the purpose of this suit is concerned, or so far as the people of that community are concerned, who had knowledge of that custom, they had made the street their platform for the purpose of receiving and discharging passengers."

It was the duty of a servant in charge of one of defendant's cars, on approaching this platform, to have it under such control that it could be stopped in time to avoid injury to a prospective passenger standing upon this platform. This was not done in the present instance, and serious injury causing the permanent impairment of the mental faculties of the plaintiff in error was the result.

We contend that the failure of the motorman in charge of the defendant's car to have that car under such control that this injury might have been prevented was the proximate cause of the accident, and that this question should have been submitted to the jury for determination.

That the jury should have decided such a case as this is well established by a number of cases in this court. Among others may be cited:

Warner *vs.* The B. and O. R. R., 168 U. S., 339.
R. R. Co. *vs.* Lowell, 151 U. S., 209, 219, 220.
Inland, etc., Co. *vs.* Tolson, 139 U. S., 551, 558, 559.
R. R. *vs.* Amato, 144 U. S., 465.
R. R. Co. *vs.* Ives, 144 U. S., 408.
R. R. Co. *vs.* Powers, 149 U. S., 43.
Jones *vs.* The R. R. Co., 128 U. S., 443; and
McDermott *vs.* Severe, 202 U. S., 604, 609.

The last case cited is especially in point as it involved an injury inflicted by this same railway, at or near the same spot where the plaintiff in error in this case was injured.

So far as counsel are advised the opinion of the Court of Appeals in this case has never been cited by that court except in the one case of Hawley *vs.* the Columbia R. R., 25 App. D. C., 1. On page four of that report, the court admits that it went to the "extreme limit" in denying to Sarah Chunn, the plaintiff in error in this case, the right of trial by jury.

We believe that under the circumstances of these two cases, which are almost similar, the granting of trial by jury to Hawley and the denial of it to Sarah Chunn created a distinction without a difference. The difference urged, that the space between cars where Chunn stood was broader than that where Hawley stood, is to lay down the principle that the constitutional right of trial by jury is one that may be measured in feet and inches.

The two following cases may be appropriately cited as being exactly in point:

Beotjen *vs.* N. Y. & H. R. R., 55 N. Y. Supp., 847.
Conway *vs.* The New Orleans, etc., R. R., 51 La. Ann., 146.

See also—

R. R. Co. *vs.* Sue, 25 Neb., 772.
Dale *vs.* Ry Co., 1 Hun (N. Y.), 146.
Dobieski *vs.* Sharp, 88 N. Y., 203.

We respectfully submit that the lower court should be reversed and a new trial ordered under the issue joined upon the plea in abatement.

VICTOR H. WALLACE,
PERCY METZGER,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 42.

SARAH CHUNN, PLAINTIFF IN ERROR,

vs.

THE CITY AND SUBURBAN RAILWAY OF WASHINGTON.

In Error to the Court of Appeals of the District of Columbia.

Brief for the Defendant in Error.

CHAS. A. DOUGLAS,
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Attorneys for Defendant in Error.

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In Error to the Court of Appeals of the District of Columbia.

Brief for the Defendant in Error.

Statement of the Case.

This action was brought by the plaintiff in error, Sarah Chunn, against the City and Suburban Railway of Washington in the Supreme Court of the District of Columbia, to recover damages for injuries alleged to have been received by her by being struck by one of the cars of the defendant in error at a place known as Riverdale, in the State of Maryland, on the 29th day of Sepember, 1900. To the declaration the defendant below filed a plea in abatement, and later filed a motion praying for leave to withdraw said plea in abatement and file in lieu thereof a plea in bar. The court granted said motion upon condition of the payment of costs to date of order by defendant, which costs were paid by the defendant and

accepted by the plaintiff below. Upon the trial of the cause the plaintiff moved the court to reconsider said order on the ground that it had been improvidently granted, and upon the overruling of said motion the plaintiff duly excepted (Rec., pp. 5, 6, and 7).

The cause was thereupon tried before a jury, and, after the plaintiff had rested her case, the court directed the jury to return a verdict for the defendant.

The uncontradicted facts as they appear from the evidence adduced on behalf of the plaintiff in error are that she went to the place called Riverdale for the purpose of taking a car of the defendant in error; that while she was waiting for the car bound to the city of Washington, at a point between the two tracks, she was struck by a car coming from said city; that the plaintiff in error had come to Washington from Riverdale about once a week for a year on the defendant's cars; that she has no recollection of the circumstances attending the accident; that she remembers a conversation she had with Mrs. Reed just before leaving her house, where she was working, to come to Washington, and the next thing she remembers is that she was being taken from the Emergency Hospital to another hospital; that at the time of the accident there was a board platform practically even with the tracks, built between the rails of each track and between the two tracks; that this so-called platform was simply some boards laid lengthwise, about on a level with the ground, extending along the tracks 30 feet; that on the west side of the west track two boards of this platform project beyond this track; that there is a kind of sink at side of west track, and that when the car comes along the step covers the board and one must stand in the mud or in that hole to get on the car; that there is a road on the west side of the track running parallel with and very close to the track; that the car which struck the plain-

tiff in error was running north, in the evening when it was light enough to recognize a person a hundred yards away; that persons standing between the tracks, at this point, could see a car approaching from either direction for a quarter of a mile; that while the cars were approaching from opposite directions, and just before they arrived at the station, the plaintiff in error herself and one Hogan, a witness in her behalf, were standing between the tracks and had been so standing for from one-half a minute to a minute, she at the north and he at the south end of the platform, before either car arrived; that the north-bound car did not stop at the station and was running at from about 12 to 15 miles an hour; that the distance between the inner rails of the two tracks was 7 feet, 10 inches; that the distance between cars passing at this point was 3 feet, 6 inches; that there was ample room, if you were thinking what you were doing, to stand between the tracks while cars were passing; that said Hogan at the time of this accident stood between the two cars as they passed; that it had been the custom of some persons to stand between the tracks and enter the cars from that position, the servants of the defendant in error opening the gates to permit passengers to enter; that at the time of and prior to this accident people got into the cars going towards Washington from both the east and west sides—whichever side a person was on they would let them in; that there were other people there at the time of the accident to get on the Washington-bound car, and did get on, but Hogan and plaintiff were the only ones seen on the boards between the tracks; that when the plaintiff in error was picked up, after having been struck, she was lying between the tracks, near the west track.

Upon the above showing of facts by plaintiff, the court directed a verdict for defendant in error on the ground

that the plaintiff was guilty of contributory negligence. This action of the court and allowing the defendant in error to withdraw its plea in abatement and file a plea in bar in lieu thereof, are the only questions presented on this appeal.

ARGUMENT.

I AND II.

The action of the Court of Appeals in affirming the ruling of the trial court in granting leave to the defendant below to withdraw its plea in abatement, and to file a plea in bar, and in overruling the motion of the plaintiff below to reconsider said order constitute the first and second assignments of error.

By section 399 of the Code of the District of Columbia, it is provided:

> "In all judicial proceedings the court, justice or judge in which, or before whom, the cause shall be pending, shall have power upon such terms as shall seem best, *at any stage of the case*, to allow amendments of writs, pleadings, or other papers in the cause, and to allow supplemental or substituted affidavits to be filed."

Under the foregoing provision of the Code, the trial court had a very broad discretion which should not be interfered with by this court, except in cases of clear abuse of that discretion. It appears that the exercise thereof was very reasonable and proper. The defendant had been lead to file the plea in abatement by the declarations of the plaintiff herself, which seem to have been contrary to the facts, as subsequently testified to by her mother and herself. The following authorities show that the action of the court below upon this point should not be disturbed.

In the case of Halsey *vs.* Hurd, 6 McLean (U. S.), 14, the defendant was permitted to withdraw a plea in abatement and to file in lieu thereof a motion to set aside the process.

In allowing the plea in abatement to be withdrawn the court was exercising its judicial discretion, which is reviewable only for gross abuse.

The Supreme Court, in the case of Eberly *vs.* Moore, 24 Howard, 147, held:

> "It is within the discretion of a Federal court to allow a plea in bar to be withdrawn, and a plea in abatement denying jurisdiction on account of citizenship to be filed."

Surely, then, it can not be seriously argued that to allow the converse of this proposition is error.

In Piquignot *vs.* P. R. R. Co., 16 Howard, 104, the defendant pleaded in abatement another action pending for the same cause of action between the same parties. To this plea the plaintiff demurred and the court gave judgment for the defendant on the demurrer, whereupon the plaintiff brought writ of error. The Supreme Court, per Mr. Justice Grier, said:

> "The question raised by the plea in abatement . . . is one of considerable importance . . . but the judgment of the court below is not subject to our revision on a writ of error."

In the case of the Mexican Central Ry. *vs.* Pinkney, 149 U. S., 194, where one of the assignments of error was the refusing leave to file a plea during progress of the trial, on question of plaintiff's citizenship, the Supreme Court, in an opinion by Mr. Justice Jackson, said:

> "The third assignment of error relates to matters purely within the discretion of the trial court, and is, therefore, of no avail. It is well settled that mere matters of procedure, such as the granting or refusing of motions for new trials and questions respecting amendments to the pleadings, are

> purely discretionary matters for the consideration of the trial court, and, unless there has been gross abuse of that discretion, they are not reviewable in this court on writ of error."

Mr. Justice Morris, in delivering the opinion of the Court of Appeals in Germ. Evan. Society *vs.* Prospect Hill Cemetery, 2 App. D. C., 310, said:

> "For it is well-settled law—sufficiently well settled to be almost elementary—that the allowance or refusal of amendment is a matter in the discretion of the court below, and is not reviewable in an appellate tribunal." Citing cases.

In the case of Morris *vs.* Wheat, 11 App. D. C., 201, an exception was taken to the ruling of the court in allowing an amendment by striking out the name of one of the plaintiffs. Mr. Justice Shepard, affirming the judgment of the lower court, said:

> "It is well settled that the granting of leave to amend is a matter of discretion in trial courts, the exercise of which is not subject of review on appeal."

The brief filed by plaintiff in error argues at great length the questions under these two assignments of error upon the hypothesis that the plea in abatement has been overruled by the trial court, and numerous authorities are cited to sustain a proposition which is not now before this court for its consideration and decision.

The trial court did not act upon the plea in abatement, but allowed an amendment of the pleadings by permitting the plea in abatement to be withdrawn and a plea to merits to be filed. If there were anything in this assignment of error the plaintiff waived it, by accepting the money paid to her as costs, under the order of the court, and joining issue on the plea in bar.

In the argument of the real question presented by these two assignments of error, the plaintiff in error admits

that had the application been made for leave to withdraw the plea in abatement at the time of issuance of the commission to take the deposition of the plaintiff's mother in support of the issue tendered by the plea in abatement it would have been entirely within the discretion of the trial court to grant defendant's leave to withdraw, but it is contended that inasmuch as the defendant did not make the application at that time, but waited until after the testimony had been taken under the commission, the court was without discretionary power to allow the amendment or withdrawal and the substitution of the plea in bar.

The gist of this contention is that the court had authority under the Code to grant the request of the defendant to withdraw the plea in abatement and substitute therefor the plea in bar, before the taking of the testimony of the mother of the plaintiff, but that thereafterwards no discretion was lodged in the trial court to do this. No authority is cited on the brief of the plaintiff in error in support of such contention.

Section 399 of the Code quoted above, provided that amendments may be allowed, upon such times as the court might deem best "at any stage of the case." Of course this means pleadings may be amended and before issue joined, or after issued joined, before the trial commences or after the trial is commenced, and even after the rendition of a verdict by the jury, in order to conform the pleadings to the proof and to the verdict. Reduced to this ultimate statement, the plaintiff in error contends that the court was without authority to permit the defendant to withdraw its plea in abatement after it was ascertained that it was not supported by the facts—this, notwithstanding the showing made to the court that the defendant had been misled into making this plea by statements of the plaintiff herself. The affidavits filed in support of

this motion show conclusively the defendant's good faith first in filing the plea in abatement and in subsequently moving the court for leave to withdraw the same. That the court had authority, under section 399 "at any stage of the case" to permit amendments to be made, does not admit of serious or earnest controversy. The sole question is whether or not the court, in the exercise of the power lodged in it was guilty of gross abuse of authority. When it is remembered that the court imposed terms on the defendant to make the payment of costs accrued, it is plain that there was and is no justification for the charge that the court was guilty of gross abuse of its discretionary powers. The fact is, the plaintiff in error accepted the terms imposed by the court and received and appropriated to her own use the amount paid for reimbursement made by her on account of costs. The manifest purpose of the court in imposing these terms was to put the plaintiff in the position as to the expenditures that she would have been in had the application been made or withdrawal of the plea granted before the taking of the deposition of the mother. There was nothing in the contention that the defendant waited one year after the publication of the testimony of the mother before making an application to the court for leave to withdraw its plea in abatement. That can not and does not throw any light on the good faith of the defendant or of the trial court. There was no complaint that the cause was not speeded or that the plaintiff in error was deprived of a trial of the issues at the right time and place, nor was there at the trial of the cause or in the brief of counsel for the plaintiff in error any complaint that the withdrawal of the plea in abatement and the substitution therefor of the plea in bar caused any surprise or worked any injury to the plaintiff in error in the hearing of the case on its merits. The statement in the

brief of plaintiff in error to the effect that the Court of Appeals treated "lightly" this contention, can and should be answered in two ways:

(1) The opinion of the Court of Appeals shows conclusively that this is an erroneous statement.

(2) Even if the contention was lightly treated, it would appear upon mere casual consideration of it that it was not entitled to any other kind of treatment.

Defendant in error submits with respect that there is no merit whatever in the plaintiff's first and second assignments of error and that the action of the trial court thereon with reference thereto is not reviewable.

III.

The principle of law, upon which the court directed a verdict for the defendant in this case, is so conclusively settled, and has been so fully and unequivocally recognized by the Court of Appeals, as well as by this court, and the State and Federal courts, that the citation of numerous authorities in support of the contention of defendant in error would be a superfluous repetition.

There is no evidence tending to show negligence on the part of the defendant in error, but it shows that the plaintiff in error was guilty of contributory negligence. The evidence introduced by the plaintiff showed, in the language of the witness—

> "that there was ample room to stand (between the cars) if you were thinking about what you were doing."

The last that was seen of the plaintiff in error prior to the accident, she was standing in this place, presumably in a position of safety. The evidence also shows that she arrived at the point in question in ample time to have passed over to the west side of the south-bound track before the car going in that direction arrived. The

proof also is that passengers were in the habit of boarding the south-bound car from the west as well as the east side thereof. She could, and, therefore, must be presumed, to have seen both cars approaching for a quarter of a mile, so that in deciding to remain between the tracks she assumed whatever of risk there was in so doing. But it also appears there was no risk if she had exercised any degree of care for her own safety. The only way for the accident to have occurred was for her to have carelessly and unnecessarily stepped near enough to the north-bound car for it to strike her. How long before the car struck her she did this does not appear. The case is thus brought fully within the principle of the cases where it has been held that a person stepping in front of a moving car is guilty of contributory negligence which bars a recovery, and such like cases in this and other courts.

In Harten *vs.* Ry. Co., 18 App. D. C., 260, where the facts were that a woman, having alighted from a car, walked around it, at a place where she could see up and down the track for 200 or 300 yards, and was struck by a car coming in the opposite direction, at the ordinary rate of speed, not exceeding 10 miles an hour, the Court of Appeals, following the ruling of this court in Northern Pacific R. R. Co. *vs.* Freeman, 174 U. S., 379, said:

> "It is unnecessary to consider whether the defendant, operating the car which did the injury, was guilty of negligence that would warrant the submission of that question to the jury, for we are of opinion that the plaintiff was guilty of contributory negligence."

Mr. Chief Justice Alvey, in delivering the opinion of the Court of Appeals, in Barrett *vs.* Ry. Co., 20 App. D. C., 381, used the following language:

> "Whether there was actionable negligence on the part of the defendant in the production of the accident may admit of doubt, but that there

> was negligence on the part of the plaintiff in bringing upon himself the injury of which he complains we think admits of no doubt. The case comes fully within the recent case, decided by this court, of Harten *vs.* Ry. Co., supra; and it is unnecessary to refer to other authorities."

That the failure of the plaintiff to have used her senses as a precautionary measure to avoid danger constituted contributory negligence, which will preclude a recovery of damages, has been affirmed so many times as to admit of no doubt.

In R. R. Co. *vs.* Houston, 95 U. S., 697, Mr. Justice Field, delivering the opinion of this court, said:

> "Had she used her senses she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, yet undertook to cross the track instead of waiting for the train to pass and was injured, the consequences of her mistake and temerity can not be cast upon the defendant."

The unexplained lapse of the plaintiff's memory from the time she left Mrs. Reed's house, on the evening of the accident, until she was being taken away from the hospital, leaves the record free from any affirmative evidence as to whether or not she looked to see if the car were coming. It is indisputable that if she had looked she would have been apprised of the imminent danger, and if she did not look she was guilty of gross negligence.

Bearing upon this point, this Court, in the case of Northern Pacific R. R. Co. *vs.* Freeman, 174 U. S. 379, held:

> "When it appears that if proper precautions were taken they could not have failed to prove

> effectual, the court has no right to assume, especially in face of all the oral testimony, that such precautions were taken."

The facts in Edgerton *vs.* B. & O. R. R. Co., 6 App., 516, were similar, in many respects, to those in the case at bar, where plaintiff's intestate was killed by being struck by a train moving at the rate of 50 or 60 miles an hour. The deceased was standing with his back somewhat towards the approaching express train on the edge of a platform at University station, just about the time an accommodation train was stopping at the station, and while in this position he was struck, with the above results. It also appeared from the evidence that the track was straight for a mile or so. Upon this statement of facts the court directed the jury to return a verdict for the defendant. That court, affirming the lower court, opinion by Mr. Justice Morris, said:

> "But whatever may have been the negligence of the railroad company in this instance, it is entirely clear to us, upon the plaintiff's own showing, that the disaster which befell the deceased was the immediate result of his own want of ordinary care and prudence. The track on which the express train was coming was straight for upwards of a mile. The train could have been seen by the deceased when it was upwards of a mile away, if he had chosen to use his eyes. . . . With such opportunity and such facility, if he, without just cause or reason, placed himself in a position of obvious danger, as he undoubtedly did, the unfortunate consequences must be charged to himself as the result of his own negligence."

The facts in the case of Miller *vs.* St. Paul Ry. Co., 42 Minn., 454, are so strikingly analogous to this case that the facts thereof are recited with some detail. At the place of the accident there were two tracks being used by cars running east and west. The tracks were a little less than 5 feet apart, leaving a space of less than 2 feet

between passing cars. The street at that place was unpaved, but the space between the tracks had been paved. For some time passengers had used this space for both getting on and off the cars, going in both directions, with knowledge of the defendant's servants. The accident occurred after dark. Owing to the muddy condition of the streets the plaintiff stood in the paved space. Another man stood at his side between the tracks. Just as the car was coming to a stop, or had stopped, and as the plaintiff was in the act of getting on the grip-car, he was struck by a car passing on the reverse track. Gripman saw the plaintiff while he was nearly a block away and understood he was there for the purpose of getting on the car, and knew he was in a dangerous place. Plaintiff was acquainted with the situation and must have known a train might have been expected at any time.

The case was submitted to the jury, who returned a verdict for plaintiff. The upper court, in reversing the lower court for refusing to grant a new trial, said:

> "There was nothing to prevent him (plaintiff) from seeing. While standing waiting for the car he was to take he had but to turn his head a little to see the bright headlight of the other train. No sudden emergency is shown to have arisen to affect the plaintiff's conduct or to distract his attention; no occasion for hasty or thoughtless action. That the plaintiff deliberately placed himself in a position which would subject him to the danger of serious injury, unless he should guard himself by watchfulness, is, we think, so apparent that a contrary conclusion would be unreasonable."

Childs *vs.* New Orleans City R. R. Co., 33 La. Ann., 154:

Plaintiff was walking in narrow space, 3 feet wide, between the tracks of the defendant company. As one car passed him, the motorman called to him, warning him of his danger from the car approaching from opposite direction.

Either through misunderstanding or heedlessness he failed to get out of the way, but rather turned towards the track on which car was coming and was struck by the latter car. The court said:

> "As he was not on the track . . . but in the narrow space between the two tracks, the driver of that car was not bound to warn him off, and can not be blamed for running over him if plaintiff moved towards the car just at the moment that the car reached him."

After discussing the facts and circumstances the court continued:

> "It is logical to conclude that plaintiff's contributory negligence, being the leading cause of the accident . . . must defeat his right to recover anything from the defendant, even though its driver may have been at fault in not averting the collision and the consequent disaster."

The following, among other cases, which support the contention of defendant in error, are:

St. Louis, etc., R. R. Co. *vs.* Martin, 61 Ark., 549.
Creamer *vs.* West End Ry. Co., 156 Mass., 320.
Halpin *vs.* 3d Ave. R. R. Co., 40 N. Y. Super., 175.

If the plaintiff was in a dangerous position as the car approached her, which does not appear by the evidence, the motorman was justified in presuming that the appellant would withdraw therefrom in time to prevent a collision.

Booth on Street Railways, section 305, says:

> "If a person be seen upon the track, who is apparently capable of taking care of himself, the driver may assume that he will leave the track before the car reaches him."

Nellis Street Surface Railroads, p. 301.
W. Chic. St. R. Co. *vs.* Schwartz, 93 Ill. App., 387.
Citizens' St. R. Co. *vs.* Shepherd, 64 S. W., 710.

In the case of Consol. R'way Co. *vs.* Armstrong (92 Md., 554), the testimony showed that the plaintiff was injured while changing from a west-bound to a south-bound car in the city of Baltimore, and was attempting to board the latter car between the tracks when he was struck by a north bound, the court in reversing the case held that the plaintiff was guilty of contributory negligence as a matter of law, saying:

> "He was palpably guilty of negligence which contributed directly to his injury and without out which the injury would not have happened. He had, it is true, an equal right with the car to be upon the track, which was laid in a public street of the city, but he went deliberately when encumbered with his awk-ward cooling-board to the dangerous side of the south-bound car when access to its safe side was unobstructed, and he stood there until he could pass the cooling-board over the gate of the front platform to the motorman and meanwhile kept no lookout for approaching cars on the north-bound track which was almost under his feet."

In the case of Egner *vs.* United Railway Co. (98 Md., 397), the deceased was standing upon a platform erected by the company on one of its suburban lines of railway when he was struck by the step of a passing car, moving at a rapid rate of speed. While in this case the court did not pass upon the question of contributory negligence, deeming unnecessary upon the view taken of the defendant's negligence, yet we think the following language of the court is applicable to the case at bar:

> "He was standing at the south end of the platform, and the car which was coming from the north and going south, passed in perfect safety four persons standing on the same platform, before it reached him. He had an uninterrupted view of the approaching car, and had an opportunity from the passing of the two previous cars to notice the

> portion of the platform which would be covered by the foot-board. According to the uncontradicted evidence of all the witnesses in the case the platform was of sufficient width for a car to pass in safety with passengers on it."

An examination and analysis of the cases cited in support of the contention of the plaintiff in error will show that the majority of the causes of action arose out of accidents which occurred to passengers while at stations of steam railway companies when the person injured was crossing parallel tracks, either in going to or from trains, and that the principles enunciated in those cases have no applicability to the state of facts as presented herein.

In the case of Betts *vs.* Ry. Co. (191 Pa. St., 575), a passenger was injured at a station of the defendant company, while crossing the track to become a passenger on another train on the opposite track, and the train which struck him did not stop at the station in violation of the rule of the defendant. The court in its opinion said:

> "It will be observed that the learned trial judge did not undertake to pronounce on the question of contributory negligence otherwise than as to the rule of stop, look, and listen. He was careful to say that the rule did not relieve the plaintiff from the exercise of ordinary care under the circumstances. It is not pretended that if he saw the train and deliberately went in front of it he could recover. But in view of all the facts and the evidence as to the location of the trains, the obstructions on the sidings and the very material question as to whether plaintiff's train was standing still or in motion—as to which the evidence was conflicting—the case was necessarily for the jury."

In the case of Warner *vs.* Ry. Co., 168 U. S., 343, plaintiff's intestate was killed by being struck at a sta-

tion on the line of defendant's railway called "University Station" in the District of Columbia, while he was in the act of crossing from the station on the west side of the tracks in order to board a north-bound train on the east track, he was struck by a south-bound train which passed the station at rapid rate of speed in violation of the rules of the defendant. The court in this case based its decision upon the ground that the decedent was a passenger, and in its opinion said:

> "The situation of the tracks, the location of the station building and the waiting room, the coming of the local train and its stopping to receive passengers in a position which required the latter to cross a track to reach the train involved necessarily a condition of things which under one view of the testimony constituted an implied invitation to the passenger to follow the only course which he could have followed to take the train; that is, to cross the track to the waiting train. Whilst it is true, as was said in Terry *vs.* Jewett, 78 N. Y., 338–344, that such an implied invitation would not absolve a passenger from the duty of exercising care and caution in avoiding the danger, nevertheless it certainly would not justify him in assuming that in holding out the invitation to board the train the corporation had not so arranged its business as to expose him to the hazard of danger to life and limb unless he exercised the very highest degree of care and caution."
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> In the case of Chicago, etc., Ry. *vs.* Lowell (151 U. S., 209), the plaintiff was injured at a station of the defendant in the city of St. Paul, Minn., while crossing the tracks, after alighting from the train on which he had been a passenger, the court held that he was not guilty of contributory negligence in not looking for a train on the other track, as he had a right to assume that the railroad company would make the crossing safe.

In the case of Railroad Company *vs.* Powers, 149 U. S., 43, plaintiff's intestate was killed by being struck by a

train of the defendant while he was in the act of crossing the tracks at a station where the train had stopped for the purpose of permitting passenger to alight to obtain supper; decedent alighted from the train, had gone to the station and was returning when he was struck by a train going in an opposite direction. The court in passing upon the question of decedent's contributory negligence, said:

> "And unless it were affirmatively shown that the deceased when he left the car and started towards the eating house, knew that he was walking along the track, and that there was danger from another train, and with such knowledge neither looked nor took precautions to satisfy himself there was present danger therefrom, it surely can not be held that there was as a matter of law contributory negligence on his part."

In the case of Jones *vs.* East Tenn. Ry., 128 U.S., 445, the plaintiff was injured while crossing the track of the defendant at a station, where he had gone on business; the evidence showed that the passenger platform ran alongside the tracks, which ran between it and the depot; there was also a side track that went through the depot; that he passed out of the depot by the usual way, and was struck between the wall of the depot and the platform; there was a conflict in the evidence as to just what the actions of the plaintiff were in the way of exercising care for his protection as he attempted to cross the track, and the court simply held that the question of the contributory negligence of the plaintiff was properly submitted to the jury on account of the conflict in the testimony.

In the case of the Northern Pacific Railway Company *vs.* Amato, 144 U. S., 465, the plaintiff, a laborer employed by the railroad company, was injured while cross-

ing a bridge upon which was laid a single track. The evidence showed that it had been the custom of the railroad to furnish a train for the laborers to return from work, and on the day of the accident there was no train provided, and the men started to walk home across the bridge, the boss in charge of the gang of laborers telling them there was no train coming. It was further shown in evidence that there was a curve in the track a very short distance beyond the bridge which prevented a clear view of the approaching train, and the plaintiff did not see the train, because it was coming around the curve. In this case, under the peculiar circumstances shown from the facts, the court simply held that the question of contributory negligence was one for the consideration of the jury, as the plaintiff had a right to rely upon the statement of the boss or foreman that no train was coming.

In the case of the Grand Railway Company *vs.* Ives, 144 U. S., 408, the plaintiff's intestate was driving a buggy in the city of Detroit, Michigan, where the roadway crossed the tracks of the defendant obliquely and that he stopped and listened for a few minutes at a point about 75 or 80 feet from the track, but the train could not be seen on account of obstructions until he got within 15 feet of the track. The court in this case held that under the circumstances adduced at the trial the question of contributory negligence on the part of the plaintiff's intestate, was properly submitted to the jury. This case, it is respectfully submitted, does not throw any light upon the questions here involved, and that in the later case of Freeman *vs.* The Railroad Company, 174 U. S., 379, this court held that under circumstances very much similar to those shown in the Ives case, the plaintiff's intestate was guilty of contributory negligence as a matter of law, and that the action of the court in directing a verdict for the defendant was not error.

In the case of McDermott *vs.* Severe, 202 U. S., 604, the plaintiff, a boy under 7 years of age, was injured at a crossing by reason of the fact that his foot had become caught in the space between the rail and a plank laid parallel therewith, and before his foot could be extricated he was run down by a car. The evidence furthermore showed that the brother of the plaintiff sounded a warning to the motorman of the approaching car, and the case was submitted to the jury for special findings of fact on the question of the negligence of the motorman. In this case, on account of the immature age of the plaintiff, the question of contributory negligence was entirely eliminated from the consideration of the jury, and it is respectfully submitted that the decision in this case has no application to the case at bar.

An examination of the other cases cited on brief of plaintiff in error will show that in nearly all of the cases, the facts were of such a character that the court did not feel justified in deciding as matter of law that the plaintiff was guilty of contributory negligence—in most of the cases the roads were operated by steam and the increased danger of such operation imposed a correspondingly strict duty on the railroad to prevent, as far as possible, danger to its passengers from the passing of its engines and trains—while in a number of the cases there were obstructions of different kinds. We think it safe to say that all of the cases cited either expressly or impliedly support the proposition that whatever may be the position of plaintiff at the time of the injury, he or she is required by law to exercise due care to avoid being hurt and that a failure to observe such caution and care will be contributory negligence. As was said in Dobieski v. Sharp, 88 N. Y. (cited on plaintiff's brief):

> "As a matter of course they [passengers] are bound to be careful in not exposing themselves

> to needless danger; . . . they must employ reasonable care and circumspection in their conduct while there, and if they fail to do this, they have not redress for injuries which occur."

In the case at bar the evidence adduced on behalf of the plaintiff in error, shows that she was injured while standing on a platform consisting of boards laid about on a level with the track and between the two tracks; that she was not at a station of the defendant in error, but was simply at a place on the line of railway of a suburban electric road, where the cars occasionally stopped to receive and discharge passengers; that she could have boarded the car to the city from the west side of the track and have been free from all danger, but that she elected to stand between the tracks because it suited her personal convenience so to do. It is clear, therefore, that the plaintiff in error, having elected to stand in the space between the two tracks, she was bound, in view of this position of danger, to exercise care in looking for the approach of cars, and to so stand in the space thus selected by her as not to unnecessarily expose herself to danger of colliding with passing cars.

Counsel for the plaintiff in error contend that the case at bar is similar to the case of Hawley *vs.* Columbia Railway Company, 25th App. D. C., No. 1, and that inasmuch as the latter case was submitted to the jury on the question of contributory negligence, that this case should likewise have been submitted. In the Hawley case the testimony showed that the clear space between passing cars was from 16 to 18 inches, "and that unless a man is standing sideways he is very apt to be hit with cars on both sides of him." The court in distinguishing that case from the case at bar said:

> "We think there are some important distinctions between the Chunn case and that now

before us. In the Chunn case it was not at all certain that the injured person had the right to stand or be in the place where she was injured—some planks laid down between the two tracks of the defendant company's railroad, and apparently only used as a platform by a kind of sufferance or tolerance of the employees of the company. But principally it appeared that there was amply sufficient distance, 7 feet and 10 inches, between the nearest rails of the two tracks, leaving 3 feet and 6 inches by actual measurement between two cars standing abreast on the two tracks—a space abundantly sufficient for a person proposing to board a passing car to stand on, and from which he might enter in safety, if, as the testimony was, he was careful to see what he was doing. It was only because the plaintiff in that case was careless in what she was doing that she went beyond the limit of safety and was injured."

Counsel for plaintiff in error, without commenting on the decisions of the Court of Appeals in the Hawley and Chunn cases, with great assurance, states that the constitutional right of trial by jury should not be determined by the mere fact of feet and inches. We answer that feet and inches might, and in some cases have become, very important factors in determining whether or not the plaintiff was guilty of contributory negligence as a matter of law, or whether the charge of contributory negligence should be submitted to the jury as a question of fact. In the Hawley case, the clear space between the two tracks was so narrow that one could not stand in that position, except sidewise, when cars were passing, while in the case at bar it is admitted that the space was wide enough for one ordinarily careful to stand between the two tracks with cars passing on either side and suffer no injury whatever. Whether the plaintiff in the Hawley case should have placed himself in that particular posi-

tion of peril, and what he should have done when confronted with the perilous situation of passing cars, was held by the Court of Appeals to be a question of fact peculiarly within the province of a jury to decide. No such controversy was presented in this case. As stated, the position occupied by the plaintiff was one of reasonable safety, assuming that she had exercised due and ordinary care while standing there, and it being admitted that an ordinarily careful person could have stood in that place and not been hurt, and the trial court held that the plaintiff having been injured in such position was of necessity guilty of contributory negligence, and hence held it to be such as matter of law.

In the case of Patton *vs.* Railroad Company, 179 U. S., 658–660, this court has very thoroughly defined the right and duty of a trial court to direct a verdict in favor of one party or the other, as from the evidence appears proper, and in an opinion delivered by Mr. Justice Brewer, has established the rule as follows:

> "It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact; and that ordinarily negligence is so far a question of fact as to be properly submitted to and determined by them. (Cases cited.)
>
> "Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one, who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a

> trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment. And if such judgment is approved by the proper appellate court, this court, when called upon to review the proceedings of both courts, will rightfully be much influenced by their concurrent opinions."

It is submitted, therefore, that the action of the trial court in directing the verdict for the defendant should be affirmed.

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